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# VIRGINIA LAW REGISTER

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In the nature of things it is to be supposed that the personnel of the Supreme Court will undergo several important changes in the course of a very short while.

**The Changing Supreme Court of the United States.** Justice Holmes and Justice Day have some time since passed the retiring age, but both are old men and

one naturally expected that very soon they would retire and their places be filled; but the resignation of Mr. Justice John H. Clarke is somewhat of a surprise. On September 18th he was sixty-five years of age and he desired his resignation to take effect before that date, and when this number of the REGISTER reaches its readers he will no longer belong to that august tribunal upon which he has shown himself a sound and learned jurist, an able, impartial and independent judge.

Mr. Justice Clarke was born in Lisbon, Ohio, on September 18th, 1857, graduated from the Western Reserve College, was admitted to the Ohio Bar in 1878, and was general counsel for the N. Y., C. & St. Louis, Railroad in Cleveland. In July, 1914, he was appointed by President Wilson United States District Judge for the Northern District of Ohio. Whilst at that post he sped business and gave eminent satisfaction both to the bar, litigants and the public. Mr. Justice Clarke was generally found dissenting with Justice Brandeis, or *vice versa*, and belonged to the decidedly progressive school; and yet he agreed with the majority of the Court in sustaining former Postmaster General Burleson's refusal to allow Victor Berger's newspaper the privilege of second class mails, Justices Brandeis and Holmes dissenting in the case. He also wrote the opinion of the majority of the Court declaring illegal and in restraint of trade the so-called

open competition plan of the National Hardwood Manufacturers' Association. In this case JJ. Brandeis, Holmes and McKenna dissented. In the Steel Corporation case, however, he and JJ. Holmes and Brandeis parted company, JJ. Day and Pitney dissenting with Mr. Justice Clarke.

The President almost immediately upon receiving Mr. Justice Clarke's resignation sent to the Senate the name of Honorable George Sutherland as his successor, and we think the President is to be congratulated upon his selection.

The new Justice was born in Buckinghamshire, England, on March 25th, 1862. He came to America whilst quite young and was educated in Utah, receiving, however, his law education at the University of Michigan, which later honored him with the degree of LL.D. He came to the bar in 1883 and practiced with marked success at Salt Lake City. He was a member of the first Utah Senate in 1896 and was a delegate to the Republican National Conventions of 1904, 1908, 1912 and 1916. He was a member of the 57th Congress from Utah but declined renomination. He was elected United States Senator for the term beginning 1905, and was re-elected. He was President of the American Bar Association in 1916 and 1917. In his two terms as Senator in Congress, from Utah, he won a very high reputation as a constitutional lawyer, taking, however, a position as a strong Federalist. He served on the Committees of the Judiciary and Foreign Relations and was constantly heard and listened to with great respect in all constitutional debates. In a series of lectures delivered before one of the universities he took rather extreme ground as to the supremacy of the Federal Government, and his work on *Constitutional Power and World Affairs*, published in 1919, is a book of decided force. It is to be believed that he will be one of the most conservative members on the bench. His services as Chairman of the Advisory Committee of the American Delegation to the Washington Conference, and his representation of the United States in the dispute concerning Norwegian ships causes us to hope that he will become also one of the strong members of the great tribunal. Justice Clarke's resignation and the appointment of Sutherland leave seven Republicans and two Democrats upon the Supreme Court, but we are frank

to say that we do not think many of the judges allow their political views to bias to any great extent the decision of the questions before them. Of course they would be more than mortal if they were not to a certain extent biased by views which they consider correct upon constitutional questions, but we confidently expect that Justice Sutherland will be fair, upright and impartial in any view he may take of constitutional or other questions brought before the Supreme Court.

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It is to be very much regretted that these valuable reports of the Attorney-General of the State should not have a wider circulation or in some way be put

**Report of the Attorney-General for 1921**

upon sale, so that the profession could have the benefit of the same, and we think that all lawyers who can possibly obtain a copy of them as they are published, should do so. Whilst some of us may not always agree with the opinions of the Attorney-General and of course they are not finally binding, they are always valuable as the opinion of an able lawyer and his able assistants, and in most cases in which we examined them it seems to us that the opinion of the Attorney-General is absolutely correct. We would suggest that some future legislature provide for the printing of a larger edition and the sale of these reports.

Not the least interesting portion of this report is that part showing the cases decided in the Supreme Court of Appeals of Virginia and now pending, in which the Attorney-General appeared. It gives a fair idea of the nature of the crimes committed in this State. For instance, we find that the cases decided in the Supreme Court of Appeals in which the Attorney-General appeared, during the past year number sixty-nine. In seventeen of these error was confessed, nine were reversed and two dismissed. We find that amongst those decided, violation of the prohibition law heads the list. There were twenty such cases. Murder follows, there being fifteen of such cases. There were five cases of larceny, four cases of seduction, two cases of house-breaking, two cases of rape, two cases of felony without designating what the particular crime was; one case of bigamy, one

case of contributing to the moral delinquency of an infant, one case of involuntary manslaughter, one case of violating the speed laws and one of violating the road laws; one case of voluntary manslaughter, one case of forgery, one case of robbery, one case of maintaining a nuisance, one case of disorder on a street-car, and one violation of the criminal laws of the Commonwealth without designating the particular crime. There was one case testing the Workmen's Compensation Law, and four cases involving questions of taxation.

There were seventy-one cases pending in the Supreme Court at the date of this report in which the Attorney-General appears. In eight of these the matter involved is not named, the record not having been received. Violation of the prohibition law again heads the list, there being twenty-one such cases. There are ten cases of murder, two cases of larceny, one case of unlawful shooting, one case of rape, one case of desertion, one case of assault, one case of assault and battery, eleven cases of felony without mentioning the particular crime, one case of misdemeanor, one case of maintaining a nuisance. There was one case in which an injunction was involved and two cases from the Corporation Commission.

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We are sorry to note that the very admirable act approved March 27th, 1922, amending the act making it a misdemeanor for a husband to

**The Desertion Act: Sessions, 1922, Acts, p. 842.** desert and neglect his wife, or for a parent to desert and neglect his child should be so ambiguous in its terms.

This act is to be found on page 842 of Session Acts of 1922. Section 2nd of the act provides that proceedings shall be instituted upon a petition verified by oath or affirmation, and upon the filing of such petition the court, or judge thereof in vacation, may cause investigation of the case to be made, who shall report thereon *to the court*, and the court, after considering said report and hearing the complainant may dismiss said petition or cause the husband or father to be summoned, or have a warrant issued by said *court* and the court thereon shall proceed to hear and determine said case on its

merits; but in case no investigation is ordered by the court it shall forthwith issue its summons or warrant against the husband or father, and upon execution thereof shall proceed as above. It will be noted that the petition may be filed before the judge in vacation and that the judge may order an investigation or proceed without it, but in either event nothing can be done until court convenes. There is no reason in the world why the judge in vacation could not pass upon all these questions and summon the party to appear before him in vacation and hear the case with all possible speed, as months may elapse before the necessary support and maintenance is given to the wife or child.

It is provided further that upon affidavit of the wife, or any other person, that there is reasonable cause to believe that the husband or father is about to leave the jurisdiction of the court with intent to desert the said wife and child or children, any justice of the peace of said city or county may issue his warrant for such person, returnable before such *court*. It is also made the duty of the chief of police, sheriff or probation officer, when in his opinion a person in his jurisdiction is guilty of failure to support his family, to bring such person before the court. It will be seen that the whole proceedings have to be brought before the court and that nothing can be done in vacation except for the justice to issue his warrant, or the judge to order investigation to be made, and even the justice's warrant to hold the party about to escape is made returnable *before the court*. Now the court may not meet until one or two months after the warrant is issued. What is to be done with the accused in the meantime? As the warrant is returnable *before the court* and not before the magistrate, can the magistrate commit the accused to jail or even bail him on a warrant not returnable before him? The desertion being a misdemeanor, we suppose this would be the case, but it is doubtful, to say the least of it. Why should not the same discretion be given to the judge in vacation as to the justice of the peace? So that the accused party may at once be brought before the judge and required to give bail?

We hope that future legislatures may clear up the ambiguity in this act and allow the whole proceedings to be heard by the judge in vacation, or in court, as the judge may prefer.

We suppose the custom of the clerk's "charging the jury" is universal in the courts of Virginia; it is certainly so in every

**Charging the Jury: What Should the Charge Be under an Indictment for Seduction under Promise of Marriage, or Illicit Connection by a Married Man with a Woman of Previous Chaste Character?**

circuit in which the writer has practiced lo! these many years. By "charging" all Virginia lawyers understand that after reading the indictment to the jury and stating the plea thereon, the clerk states to the jury the different degrees of punishment affixed to the crime of which the prisoner is accused and of which he may be convicted under the indictment. It is generally done in a very perfunctory sort of way and we can hardly see how any jury can retain what is said to them. Well do we remember the dignity with which a venerable and very rotund old Virginia clerk used to deliver his charge: "Gentlemen of the jury, Look upon the prisoner and hearken to his cause. He stands indicted," etc., etc.; and then after stating the plea and the various degrees of punishment, his solemn conclusion: "If you find him not guilty, *sesso* and no mo', and hearken to the evidence." In our youthful visits to the court house we were very much impressed with the word "*sesso*," supposing it was some very abstruse word of deep and hidden legal meaning, and the first time we heard a new clerk say "say so and no more" we felt a distinct shock. But to our muttons!

Why should not the "charge" to the jury be put in writing and given to the jury with the indictment? Time and again the writer has seen a jury return to the court room to ask what degree of punishment they could find against a prisoner. All this time and trouble could be saved if the clerk had the charge in writing and after reading it as the law directed him to hand it to the jury with the indictment.

A question of some interest arose in a case in court in one of the counties of Virginia, which we think was correctly answered by the judge. A married man was on trial charged with illicit connection with a female of previous chaste character. The fact of illicit connection was practically admitted. The defense was that the girl was not of "previous chaste character." Several

days were consumed in the trial, which was bitterly fought, and with all the disgusting details trials of such character usually develop. The clerk gave the usual charge, confining it entirely to the punishment for illicit connection, Sec. 4140, Va. Code of 1919. There was a hung jury. A day or so after the trial one of the jury informed the Attorney for the Commonwealth that he was one of the majority of the jury who declined to vote for an acquittal, as he thought the man guilty and the girl had not been satisfactorily proven to be unchaste. "And yet," said he "I was in grave doubt of the latter case. That is what 'hung' us, and yet I believe if we could have fined the man we would have all agreed." At the next trial the Attorney for the Commonwealth suggested to the judge that in giving the charge to the jury the clerk ought to inform the jury as to the punishment for adultery. He argued that in prosecutions for murder the clerk gave the jury the degrees of punishment, from murder in the first degree down to simple assault, charging the jury that if they found the prisoner guilty in any degree down to a simple assault the punishment would be as follows, etc., etc.; that in an indictment for the gravest offense the least was included and that therefore in an indictment for seduction the clerk should charge the jury that if they found the prisoner guilty as charged in the indictment the punishment would be not less than two years' confinement, etc., or that they could find the accused guilty of adultery, etc., and fix his punishment, etc., etc. Upon this second trial the prisoner was found guilty of adultery and fined to the limit of the law. The same thing occurred at a later date when a young man was tried for seduction, which was admitted, but the character of the female was successfully attacked in the opinion of most of those who heard the evidence, though not in the opinion of two or three of the jury. In this case the clerk charged, "If you find him guilty of fornication you are then to fix his punishment at a fine," etc., etc. A mistrial was avoided, the accused found guilty of fornication and fined the limit of the law.

Now, was this charge correct? We have no doubt that it was, but it was the first time known to the writer in a practice of over forty years, in which it was thus given. We do not know the custom in other circuits and would be glad to hear from any one who does.

Probably there is no subject of litigation which has given rise to so many conflicting decisions and which sometimes seems to

lead the lawyer into a very maze

**Contributory Negligence:** of doubt, as that which involves  
**City Ordinances: Last** questions of contributory negli-  
**Clear Chance.** gence and what is known as the

last clear chance. We think the

Virginia Bar is very fortunate in four decisions lately handed down by our Supreme Court of Appeals. These cases are *Payne v. Brown*, 112 South Eastern 833; *Perkins v. The Director of Railroads*, 112 South Eastern 839; *Virginia Railway & Power Company v. Oliver*, 112 South Eastern 841; and the *Virginia Railway & Power Company v. Wellons*, 112 South Eastern 843.

These cases also exemplify that in cases of contributory negligence, to use the old homely adage, "Each tub must stand upon its own bottom": that while general rules must and should be laid down upon all legal questions, the application of those rules must to a certain extent depend upon the peculiar circumstances of each case. *Payne v. Brown* was a question of contributory negligence of a driver when injured at a railway crossing, and in the case Judge Kelly, who delivers the opinion of the Court, gives a thorough review of all the Virginia authorities on the question of contributory negligence of a driver when injured at a railroad crossing. This was a case where a motor truck was struck by a railway train at a railroad crossing after the driver had slowed down, drove cautiously and continued to look and listen and not stop, though his view of an approaching train was in fact obstructed by coal cars on an adjoining track, where he could reasonably expect to have seen evidences of the train's approach over the tops of the cars and had a boy on the truck whom he had sent ahead to signal. The Court very properly held that the ordinary care which it is the duty of a motor truck to observe on approaching a railroad crossing depends upon the circumstances of the case and must be commensurate with the danger; and that such ordinary care on the part of one injured is a question for the jury, if the facts are such that fair minded men might reasonably differ thereon. There is a valuable addition to the law on the subject in this, that the Court refused an instruction holding that even when the driver's view was ob-

structed by cars on an intervening track to such an extent he could not see the approaching train without stopping, it was his duty to stop in a place of safety and use reasonable care to ascertain if a moving train was upon the track; the Court held this instruction erroneous in that it disregarded the plaintiff's "reasonable belief" that he could have seen the train, notwithstanding the obstruction, and his caution in running slowly, listening for the train and depending upon the signal which it was defendant's duty to give.

*Perkins v. Director General of Railroads* was an accident at a railroad crossing when a lady driving a buggy was struck by a train approaching without warning. In this case the woman approaching the crossing sent her little son ahead to see if any train was coming. The boy came back and reported all was right, and got into the buggy. Just as she got on the track, or partly over it, a train running at a very high rate of speed, which speed was contrary to the city ordinance, injured the lady, for which injury she recovered a verdict of five thousand dollars. There was a conflict of testimony which of course settled all the testimony adverse to the plaintiff.

In the case of *Virginia Railway & Power Company v. Oliver*, there was a collision between a street railway car and a vehicle. In this case the street car was also running at a very high rate of speed and had the street car been running at a legal rate of speed the accident would not have happened. The Court in this case laid down the law that the driver of a vehicle can assume that a street car will run at a lawful speed and is not contributorily negligent for going upon the track after once looking and seeing no car approaching too close to prevent his crossing the track in safety if the car was not exceeding the speed limits.

The last case, *Virginia Railway & Power Company v. Wellons*, Judge Kelly again delivering the opinion of the Court, was also a case in which a street car collided with an automobile in the street of Richmond. The automobile was wrecked and Wellons slightly injured and there was a verdict in his favor for twelve hundred and fifty dollars. In this case there was conflicting testimony but it was well established that the car was running at an excessive rate of speed and that the accident would not have happened but for this fact. This case is important in that it defines

with much clearness the question of the last clear chance. It was contended in the lower court that that court erred in allowing the jury to consider the doctrine of last clear chance. The defendant contending that this doctrine could not in view of the evidence apply to the case, but the Supreme Court held that this position was not tenable. The motorman evidently saw the automobile moving at the rate of four to six miles an hour, and in the act of entering the westbound track about forty feet ahead of him. He was exceeding the speed limit. He did not reverse his car until within ten feet of the plaintiff. The Supreme Court held that the jury was justified in holding that the motorman must have seen the plaintiff in a position of danger from which he could not extricate himself unless the speed of the car was arrested, and that the motorman after this situation arose, in the exercise of great care, should have reduced the speed of his car and thus allowed the automobile to clear the crossing, especially in view of the fact that the front wheels of the automobile had cleared the crossing when the collision occurred. Objection was made to the giving of the following instruction :

"The jury are instructed that, although they may believe from the evidence that the plaintiff was guilty of contributory negligence in driving his car in front of and in dangerous proximity to the defendant's street car, yet, if they further believe from the evidence that, after the defendant's motorman, in the exercise of ordinary care, saw or ought to have seen the plaintiff's danger in time to have avoided the accident and injury to him, and failed to do so, and by reason of such failure the plaintiff and his automobile received the injury complained of, they should find for the plaintiff."

The Supreme Court held that while this instruction was not a model, it correctly stated the law, and here the opinion of the Court is of great value upon a somewhat new question. It was contended that the error in this instruction was that it failed to tell the jury that the plaintiff must have appeared to the motorman to be unconscious of his danger, but the Court says :

"Unconsciousness of the danger by a plaintiff may be the test in some cases, but it is not the sole test of the right to invoke the rule of the last clear chance. For example a man negligently crossing a long railroad bridge or trestle may, before he gets across, see a train coming, and be painfully conscious

of his danger, and yet he will in such a case be entitled to recover if the engineer, by the exercise of ordinary care, could have seen his peril and avoided injuring him, and failed to do so. In the instant case, if the situation was such as that the motorman was obliged to know that a collision was inevitable unless he checked his own speed, then the question of the plaintiff's consciousness of his danger is immaterial. His realization of the danger would not have helped his situation after his car was on the track."

We think that the profession will find in these four cases probably one of the best statements of the law upon the points raised we have yet seen.

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NOTE.—We regret to say that our Associate Editor, Bierne Stedman has been quite ill for nearly a month and in addition to much suffering has had serious trouble with his eyes. To the "so-called Editor-in-Chief," Mr. Stedman's illness and cessation from work is nothing less than a calamity. We are glad to say that he is steadily improving and we know our readers share with us the hope that he will soon be restored to health and able to take up his work again. Walter Carrington, Esq., will have charge of the REGISTER until Mr. Stedman's recovery.